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***Wilder v. Amatex Corp.*: A First Step Toward Ameliorating the Effect of Statutes of Repose on Plaintiffs with Delayed Manifestation Diseases**

Statutes of repose have emerged in recent years as a controversial method of limiting manufacturers' liability for injuries caused by their products.¹ These statutes limit the time period within which plaintiffs may bring actions based on defects in products and thus often lead to harsh results when the manifestation of the product's effect is delayed. Nevertheless, in *Barwick v. Celotex Corp.*,² an asbestosis case,³ the United States Court of Appeals for the Fourth Circuit upheld a North Carolina statute of repose against constitutional attack and held that the plaintiff was barred from recovery.⁴ Although other jurisdictions have found similar statutes unconstitutional,⁵ the federal court of appeals predicted that the North Carolina Supreme Court would find that the statute did not violate the North Carolina or United States Constitutions.⁶ A year later, the North Carolina Supreme Court had the opportunity to determine the statute's constitutionality in another asbestosis case, *Wilder v. Amatex Corp.*⁷ In contrast to the federal court of appeals, the North Carolina Supreme Court found that the statute of repose did not bar the plaintiff's recovery.⁸ However, the supreme court avoided the constitutional issues reached by the federal court of appeals by hold-

1. See McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U.L. REV. 579 (1981).

2. 736 F.2d 946 (4th Cir. 1984).

3. "Asbestosis" refers to fibrosis of the lungs caused by asbestos dust. The disease, characterized by breathlessness, progresses long after exposure to asbestos ceases. There is no known treatment to stop the progression of the disease. W. PARKES, OCCUPATIONAL LUNG DISORDERS 255, 267-73 (2d ed. 1982). For a general discussion of the history and social implications of asbestos litigation, see Brodeur, *Annals of Law: The Asbestos Industry on Trial* (pts. I-IV), NEW YORKER, June 10, 1985, at 49; June 17, 1985, at 45; June 24, 1985, at 37; July 1, 1985, at 36.

4. For a description of statutes of repose, see *infra* notes 13-19 and accompanying text.

5. See *infra* notes 155-170 and accompanying text.

6. *Barwick*, 736 F.2d at 948-49. A federal court must apply the law of the state in which it is sitting unless the case is governed by the United States Constitution or acts of Congress. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). In determining what the law of a state is the federal court generally must rely on the decisions of the state's highest court. See C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 58 (4th ed. 1983). If that court has not yet decided the issue, however, the federal court may "consider all the data the highest court of the state would use in an effort to determine how the highest court of the state would decide." *Id.* § 58, at 373. The decision of the state supreme court prevails if it construes the statute differently from the federal courts. *Nature Conservancy v. Machipongo Club, Inc.*, 579 F.2d 873, 875 (4th Cir. 1978).

7. No. 239PA84 (N.C. Nov. 5, 1985). *Wilder* arose out of the Orange County Superior Court. While the case was pending before the North Carolina Court of Appeals, a petition for discretionary review was filed pursuant to N.C. GEN. STAT. § 7A-31 (1981 & Supp. 1985). The North Carolina Supreme Court granted the petition for review prior to the court of appeals' determination on the merits. Petition for Discretionary Review Under G.S. 7A-31 (filed May 11, 1984; allowed July 6, 1984). Defendants based the petition for discretionary review on the arguments that most asbestosis cases were being filed in the federal district courts, *id.* at 5, and that the federal courts were having to predict whether the state courts would find statutes of repose constitutional as applied to delayed manifestation diseases. *Id.* at 8. Plaintiff joined in the petition for the same reasons. *Id.* at 11. However, the North Carolina Supreme Court's decision in *Wilder* never addressed the constitutional issues raised in the petition.

8. *Wilder*, slip op. at 3.

ing that the general assembly could not have intended the statute to apply to delayed manifestation diseases such as asbestosis.⁹

The statute at issue in *Barwick* and *Wilder* was repealed in 1979 and replaced by two similar statutes.¹⁰ Because the supreme court did not rule on these statutes, it is unclear whether delayed manifestation disease plaintiffs whose claims are governed by the new statutes will be barred by the statutes' repose provisions. Thus, although *Wilder* assures that plaintiffs in North Carolina with delayed manifestation diseases who filed claims before October 1, 1979,¹¹ will not be barred from recovery by the applicable statute of repose, plaintiffs with more recent claims may be left without a remedy.¹² *Wilder* indicates the public policy of the State that such plaintiffs should not be barred by statutes of repose. It is also possible that such statutes are unconstitutional when applied to plaintiffs with delayed manifestation diseases. This Note analyzes the decision of the supreme court in *Wilder* and finds that although the court reached a commendable conclusion, it used questionable reasoning in reaching that conclusion. The Note then discusses the holding of the Fourth Circuit in *Barwick* and concludes that although a significant body of law supports the conclusion that statutes of repose are unconstitutional, the *Barwick* court's prediction that the North Carolina Supreme Court would uphold such statutes is probably correct. To avoid the application of the current statutes to plaintiffs with delayed manifestation diseases, therefore, the general assembly should amend the current statutes to make it clear that their repose provisions do not apply to claims based on delayed manifestation diseases such as asbestosis.

Statutes of repose cut off manufacturers' potential liability for harm caused by their products after a certain amount of time has elapsed. Thus, a statute of repose may serve "as a 'cap' on the discovery rule"¹³—for example, a statute might provide that a plaintiff must bring suit within three years of discovering injury, but in no event after ten years from the date of the last wrongful act of the defendant. The statute runs independently of injury to the plaintiff and places an absolute limit on the period within which the plaintiff can bring a products liability action.¹⁴ Unlike statutes of limitations, statutes of repose define a substantive right.¹⁵

9. *Id.* In addition to victims of asbestosis, plaintiffs with other delayed manifestation diseases such as silicosis and byssinosis may be affected by North Carolina's statutes of repose. The injurious effect of certain drugs such as DES also is delayed, thus further increasing the number of plaintiffs who potentially may be affected by statutes of repose. See *Wilder*, slip op. at 2 (Meyer, J., dissenting) (listing types of delayed manifestation cases).

10. See *infra* note 23.

11. The effective date of the new statutes was October 1, 1979.

12. See *infra* note 200.

13. Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 652 (1983).

14. *Id.*

15. *Id.* The North Carolina Supreme Court has stated: "The statute [of repose] . . . acquires its substantive quality by barring a right of action even before injury has occurred if the injury occurs subsequent to the prescribed time period." *Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 427, 302 S.E.2d 868, 872 (1983) (quoting *Smith v. American Radiator & Standard Sanitary Corp.*, 38 N.C.

Two North Carolina statutes of repose apply in the products liability context.¹⁶ North Carolina General Statutes section 1-50(6) bars actions brought more than six years after the initial purchase of a product for use or consumption.¹⁷ Under section 1-52(16), causes of action for personal injury or damage to property accrue when the harm becomes apparent or reasonably should have become apparent.¹⁸ However, the section provides that no cause of action may accrue more than ten years after the last wrongful act of the defendant, regardless of when the injury is discovered.¹⁹

The statute of repose in effect at the time of *Wilder* and *Barwick*, North Carolina General Statutes section 1-15(b),²⁰ was similar to section 1-52(16) in that it served a dual purpose. It contained both a ten-year repose provision and a "discovery" provision. Thus the statute provided that a cause of action would not accrue until a claimant either discovered or reasonably should have discovered his or her injury, but established an absolute limitation of ten years from the last wrongful act of the defendant. The effect of the statute was the same as that of the current statutes: if an injury was not discovered within a certain period of time, the injured party's claim was barred.

In *Wilder*, plaintiff J.W. Wilder's forecast of evidence indicated that he had worked as an insulator from 1938 until 1979 and had been exposed to defendants' products containing asbestos throughout that period.²¹ Although he began experiencing shortness of breath in the late 1960s, his condition was not diagnosed as asbestosis until 1979 when he underwent a biopsy. He filed suit against manufacturers and suppliers of asbestos-containing products in 1981.²²

Defendants argued that the statute of repose barred plaintiff's claims,²³ pre-

App. 457, 461, 248 S.E.2d 462, 465 (1978), *disc. rev. denied*, 296 N.C. 586, 254 S.E.2d 33 (1979), *overruled on other grounds*, *Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982)).

16. See *infra* note 23.

17. N.C. GEN. STAT. § 1-50(6) (1983) (text quoted *infra* at note 23).

18. *Id.* § 1-52(16) (text quoted *infra* at note 23).

19. *Id.* § 1-52(16) (text quoted *infra* at note 23).

20. Act of July 21, 1971, ch. 1157, 1971 N.C. Sess. Laws 1706, 1706 (codified at N.C. GEN. STAT. § 1-15(b)), *repealed by* Act of May 28, 1979, ch. 654, § 3a, 1979 N.C. Sess. Laws 687, 689. See *infra* note 23 for text of the statute.

21. *Wilder*, slip op. at 4.

22. *Id.*

23. *Id.* at 2. The applicable statute was N.C. GEN. STAT. § 1-15(b), which read:

Except where otherwise provided by statute, a cause of action, other than one for wrongful death, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs; *provided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief.*

Act of July 21, 1971, ch. 1157, § 1, 1971 N.C. Sess. Laws 1706, 1706 (emphasis added). This statute was repealed in 1979, Act of May 28, 1979, ch. 654, § 3a, 1979 N.C. Sess. Laws 687, 689, when the general assembly enacted the Product Liability Act. Section 1-15(b) was partly recodified as N.C. GEN. STAT. § 1-52(16) (1983), which contains a ten-year repose provision for actions for personal injury or damage to property. Section 1-52(16) provides:

Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes referred to in G.S. 1-15(c) [causes of action for malpractice arising out of performance or nonperformance of professional

sumably because plaintiff could not show exposure to particular asbestos-containing products during the ten-year period prior to his diagnosis.²⁴ The trial court granted summary judgment for defendants, relying on section 1-15(b), the statute of repose in effect at the time of plaintiff's diagnosis.²⁵

The North Carolina Supreme Court²⁶ reversed the trial court's decision and held that section 1-15(b) did not bar plaintiff's claim²⁷ because the statute did not apply to claims arising out of disease.²⁸ The supreme court reasoned that the general assembly's purpose in enacting section 1-15(b) was to adopt the "discovery rule" for the accrual of a cause of action.²⁹ Prior to the adoption of

services], shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

In addition, the general assembly enacted N.C. GEN. STAT. § 1-50(6) (1983), which contains a six-year period of repose for products liability actions. Section 1-50(6) provides:

No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

24. If plaintiff were able to show exposure to defendants' asbestos-containing products within the ten-year period preceding commencement of his action, his claim would not be barred by N.C. GEN. STAT. § 1-15(b) because it would have been brought within 10 years of the last wrongful act of the defendant.

25. *Wilder*, slip op. at 2-3. For the language of N.C. GEN. STAT. § 1-15(b), see *supra* note 23. The trial court also granted summary judgment for defendant Owens-Corning Fiberglas Corporation on the ground that plaintiff's forecast of evidence did not show exposure to products manufactured, sold, or distributed by Owens-Corning. *Wilder*, slip op. at 3. The supreme court reversed summary judgment for Owens-Corning, stating that there was no reason to believe plaintiff would not be able to show exposure to Owens-Corning's products. *Id.*

26. See *supra* note 7 for a description of how *Wilder* reached the supreme court.

27. *Wilder*, slip op. at 3. See *supra* note 25 for a description of the other ground on which the supreme court reversed the trial court.

28. *Wilder*, slip op. at 7.

29. *Id.* at 9. The court cited *Raftery v. Wm. C. Vick Constr. Co.*, 291 N.C. 180, 230 S.E.2d 405 (1976). In *Raftery* plaintiff's intestate was injured by a defective crane manufactured by defendant more than 10 years earlier. The North Carolina Supreme Court held that plaintiff's wrongful death action was not barred by § 1-15(b) because the statute applied only to injuries that were not apparent at the time they occurred. The result was that plaintiff was not time-barred, even though defendant's last act occurred 19 years earlier. In her dissent, Chief Justice Sharp stated that the claim should have been barred because the defect in the crane was not readily apparent. *Raftery*, 291 N.C. at 203, 230 S.E.2d at 418 (Sharp, C.J., dissenting).

The majority in *Raftery* also discussed the balancing of interests behind the statute: adoption of the discovery rule aided plaintiffs whereas the repose period protected defendants. *Raftery*, 291 N.C. at 189, 230 S.E.2d at 410. The *Wilder* court quoted the following language from *Raftery* as describing the purpose of section 1-15(b):

"The purpose of G.S. 1-15(b) was to give relief to injured persons from the harsh results flowing from this previously established rule of law. . . .

To prevent the statute from subjecting tortfeasors to suit for alleged acts or defaults so far in the past that evidence as to the event would be difficult to secure and intervening causes would be likely, though difficult to prove, the Legislature added this proviso: '[p]rovided that in such cases the period [i.e., the period within which the action may be brought] shall not exceed ten years from the last act of the defendant giving rise to the claim for relief.' (Emphasis added). Expressly, the proviso is limited to 'such cases'; that is, the proviso applies only to cases in which the bodily injury, or defect in property, for which damages are sought was not readily apparent to the claimant at the time of its origin. In such case, the action must be brought within ten years from the wrongful act or default even though the plaintiff did not discover the injury until later. (Emphasis supplied)."

Wilder, slip op. at 9-10 (quoting *Raftery*, 291 N.C. at 188-89, 230 S.E.2d at 409-10).

the discovery rule, North Carolina courts had followed the common-law rule that a cause of action accrues at the time of injury. Rigid application of this rule often had barred plaintiffs with meritorious actions. For example, the *Wilder* court cited *Shearin v. Lloyd*,³⁰ in which plaintiff's malpractice suit against a doctor who had left a sponge in plaintiff during surgery had been barred by the statute of limitations because plaintiff's cause of action accrued at the time defendant left the sponge in the body rather than when plaintiff discovered the sponge. With the enactment of section 1-15(b), North Carolina rejected the common-law rule and adopted the discovery rule, which provides that a cause of action does not accrue until the injury is discovered or reasonably should have been discovered.³¹

The *Wilder* court noted that none of the earlier cases that prompted enactment of the discovery rule had involved diseases.³² The court distinguished diseases from other types of injuries, because in the case of disease, it may not be possible to identify a particular exposure as causing injury.³³ In particular, delayed manifestation diseases³⁴ may take many years to identify themselves;³⁵ thus, "[t]he first identifiable injury occurs when the disease is diagnosed as such,

30. 246 N.C. 363, 98 S.E.2d 508 (1957); see *Wilder*, slip op. at 8. The court in *Wilder* also cited other examples of the harsh effect of the common-law rule: *Jewell v. Price*, 264 N.C. 459, 142 S.E.2d 1 (1965) (statute of limitations commenced at time furnace was negligently installed in plaintiff's house rather than at time of discovery of defendant's negligence after house destroyed by fire); *Thurston Motor Lines, Inc. v. General Motors Corp.*, 258 N.C. 323, 128 S.E.2d 413 (1962) (statute of limitations commenced upon sale of vehicle to plaintiff rather than when vehicle destroyed by fire); *Lewis v. Shaver*, 236 N.C. 510, 73 S.E.2d 320 (1952) (plaintiff brought action for assault and trespass after discovering that defendant had removed one of plaintiff's ovaries and tied her Fallopian tubes after she entered hospital for removal of cyst on ovary; court held limitation period began at time of surgery rather than at time of discovery). See *Wilder*, slip op. at 8.

31. See Wurfel, *Statutes of Limitations in the Conflicts of Laws*, 52 N.C.L. REV. 489, 542-43 n.235 (1974); *supra* note 23.

32. *Wilder*, slip op. at 10. In noting that these cases did not involve diseases, the court overlooked *Powers v. Planters Nat'l Bank & Trust Co.*, 219 N.C. 254, 13 S.E.2d 431 (1941). *Powers* is discussed *infra* at notes 65-67 and accompanying text.

33. *Wilder*, slip op. at 10.

34. The *Wilder* court did not explicitly restrict its analysis to delayed manifestation diseases. The holding appears to be broad enough to apply to claims arising out of any type of disease. See *Wilder*, slip op. at 3 ("G.S. 1-15(b) has no application to claims arising from disease."). The court suggested that its holding might apply to diseases such as hepatitis. Citing *Booker v. Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979), a case involving hepatitis, the court stated, "Even with diseases which might be caused by a single harmful exposure such as, for example, hepatitis, it is ordinarily impossible to determine which of many possible exposures in fact caused the disease." *Wilder*, slip op. at 11.

On the other hand, much of the court's analysis appears applicable only to delayed manifestation diseases. The court is concerned with those situations in which "it is not possible to say precisely when the disease first occurred in the body." *Id.* at 15. Most diseases manifest themselves shortly after exposure to the disease-causing instrumentality; thus, statutes of repose are irrelevant. Statutes of repose are problematic only when the disease does not manifest itself until many years after exposure. The court clearly is aware of this fact; it discussed the long manifestation periods for asbestosis, chronic obstructive lung disease, byssinosis, and silicosis. *Id.* at 10-11. Whether or not *Wilder* could be applied to diseases that do not take years to become apparent, the issue will not often arise outside the delayed manifestation disease context.

35. See *infra* notes 178-81 and accompanying text; see also *Wilder*, slip op. at 10-11 (citing *Borel v. Fiberboard Paper Prods. Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) (asbestosis does not manifest itself until 10 to 25 years after exposure; other diseases also take many years to manifest themselves)).

and at that time it is no longer latent.”³⁶

From an examination of workers' compensation statutes and cases construing them, the supreme court concluded that the court and the general assembly had been aware of the difference between disease and other types of injury in terms of “identifying legally relevant time periods.”³⁷ In *Blassingame v. Southern Asbestos Co.*,³⁸ plaintiffs brought a claim under the North Carolina Workmen's Compensation Act in effect at the time³⁹ for the asbestosis-caused death of W.S. Blassingame.⁴⁰ The statute required written notice of “the first distinct manifestation of an occupational disease . . . within thirty (30) days after such manifestation, and, in the case of death, . . . within ninety (90) days after occurrence.”⁴¹ In addition, a claimant was required to bring a claim for disability or death within one year after disablement or death, or else the claim would be barred.⁴² Plaintiff's asbestosis was not diagnosed until the autopsy report on May 10, 1937.⁴³ He died on April 1, 1937,⁴⁴ and his widow filed her claim on July 20, 1937.⁴⁵ The North Carolina Supreme Court affirmed the Industrial Commission's finding that the claim was filed within the applicable ninety-day period, even though the claim was filed more than ninety days after death.⁴⁶ The court stated:

Thus it will be seen that it was humanly impossible for the widow to have given notice of such death (death resulting from asbestosis) within ninety days after the death. To construe this section as contended by the defendants would be to deny the benefits conferred by the act in this and all similar cases. The context of the Compensation Act does not favor such a strained or technical construction. The cause of deceased's death could only be ascertained by autopsy, as above set forth, and notice was given within ninety (90) days after discovery and action brought within one (1) year.⁴⁷

In another workmen's compensation case, *Duncan v. Carpenter & Phillips*,⁴⁸ plaintiff developed a lung disease after he was exposed to silica dust during employment.⁴⁹ Examinations in 1935, 1936, and 1946 revealed lung impairment, but his condition was not diagnosed as silicosis until November 29, 1948.⁵⁰ He had stopped work April 23, 1948, and had filed his claim for com-

36. *Wilder*, slip op. at 10.

37. *Id.* at 11.

38. 217 N.C. 223, 7 S.E.2d 478 (1940).

39. Act of March 26, 1935, ch. 123, § 1, 1935 N.C. Sess. Laws 130, repealed by N.C. GEN. STAT. § 97-58 (1985).

40. *Blassingame*, 217 N.C. at 224, 7 S.E.2d at 478.

41. Act of March 26, 1935, ch. 123, § 1, 1935 N.C. Sess. Laws 130, 135, repealed by N.C. GEN. STAT. § 97-58 (1985).

42. *Id.*

43. *Blassingame*, 217 N.C. at 232, 7 S.E.2d at 483-84.

44. *Id.* at 224, 7 S.E.2d at 478.

45. *Id.* at 232, 7 S.E.2d at 484.

46. *Id.* at 232-33, 7 S.E.2d at 484.

47. *Id.* at 233, 7 S.E.2d at 484.

48. 233 N.C. 422, 64 S.E.2d 410 (1951).

49. *Id.* at 423, 64 S.E.2d at 411.

50. *Id.* at 423-24, 64 S.E.2d at 412.

pensation on April 25, 1949.⁵¹ Plaintiff brought suit against defendant one year and two days after he left work but less than a year after diagnosis of his silicosis.⁵² The Industrial Commission held that he did not file his claim within one year of disablement as required by the applicable statute.⁵³ The statute provided that "[t]he time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has same,"⁵⁴ but also required notice within one year after death, disability, or disablement, or the claim would be barred.⁵⁵ The North Carolina Supreme Court reversed the Industrial Commission's holding, stating that disablement occurs when the employee's disease is diagnosed and the employee is informed of that diagnosis.⁵⁶

From its analysis of these two cases, the *Wilder* court concluded that "when the legislature considered occupational diseases, it almost always equated the disease's manifestation or its diagnosis as being the 'injury' from which various time periods began to run."⁵⁷ The time limitations in various statutes have *always* begun to run upon diagnosis of a disease rather than upon exposure to the disease-causing instrumentality. Thus, the court reasoned, when section 1-15(b) was enacted it was not necessary to adopt the discovery rule for injuries caused by disease—a version of the discovery rule was already in effect for diseases.⁵⁸ In addition, if section 1-15(b) did apply to diseases, then a cause of action would accrue not upon diagnosis, but when the disease was discovered or reasonably should have been discovered, which could occur prior to diagnosis.⁵⁹ The court found it "inconceivable" that the general assembly intended that a cause of action for disease could accrue before diagnosis of the disease.⁶⁰

The court supported its conclusion that section 1-15(b) was not intended to apply to diseases by noting that earlier versions of the statute contained references to disease that were deleted before the statute was enacted.⁶¹ Thus, the court concluded that section 1-15(b) was adopted purely in reaction to earlier cases in which statutory time periods were deemed to accrue on the date of

51. *Id.* at 424, 64 S.E.2d at 412.

52. *Id.* at 423-24, 64 S.E.2d at 411-12.

53. Act of Mar. 19, 1945, ch. 762, § 1, 1945 N.C. Sess. Laws 1070, 1070, *amended by* Act of Apr. 12, 1955, ch. 525, § 6, 1955 N.C. Sess. Laws 468, 472.

54. Act of Mar. 19, 1945, ch. 762, § 1, 1945 N.C. Sess. Laws 1070, 1070.

55. Act of Mar. 19, 1945, ch. 762, § 1, 1945 N.C. Sess. Laws 1070, 1070, *amended by* Act of Apr. 12, 1955, ch. 525, § 6, 1955 N.C. Sess. Laws 468, 472.

56. *Duncan*, 233 N.C. at 426-27, 64 S.E.2d at 414. In *Wilder*, the court quoted the following language from *Duncan*:

"Were we to rule otherwise, it would be necessary to hold that it was the legislative intent to require an employee, in many instances, suffering from any one of these occupational diseases to make a correct medical diagnosis of his own condition or to file his notice and claim for compensation before he knew he had such disease, or run the risk of having his claim barred by the one year statute."

Wilder, slip op. at 14 (quoting *Duncan*, 233 N.C. at 426-27, 64 S.E.2d at 414).

57. *Wilder*, slip op. at 14.

58. *Id.* at 15.

59. *Id.* at 15-16.

60. *Id.* at 16.

61. *Id.* at 16-17.

injury rather than on discovery of injury. Those cases did not involve disease claims; section 1-15(b), therefore, was not intended to apply to disease claims. Thus, plaintiff's claim was not barred and the case was remanded for trial.⁶²

Although its holding is laudable, the court's reasoning is not. The court's analysis of the legislative intent behind section 1-15(b) was pure conjecture. It is possible that the general assembly did not intend for 1-15(b) to apply to disease; it is more likely that it did not consider the distinction between injury and disease. The workers' compensation statute in effect when Wilder's condition was diagnosed required disablement to occur within two years of the last exposure to asbestos; the current statute allows disablement to occur ten years after exposure.⁶³ As Justice Meyer noted in his dissent in *Wilder*, this treatment of asbestosis claims in the workers' compensation statutes suggests that the general assembly was perfectly willing to impose a cap on the length of time within which asbestosis victims could bring suit.⁶⁴

The majority's conclusion that section 1-15(b) was enacted to adopt the discovery rule only for nondisease-related claims was based on an incomplete

62. In his dissent, Justice Meyer stated his belief that the majority's result means no statute of repose applies to occupational disease claims for diseases diagnosed prior to October 1, 1979. *Wilder*, slip op. at 1 (Meyer, J., dissenting). Thus, the only time limit for these claims is that they must be filed within three years of diagnosis as required by N.C. GEN. STAT. § 1-52(16). Justice Meyer did not agree that the general assembly intended this result. *Wilder*, slip op. at 1 (Meyer, J., dissenting). He stated that the general assembly could not have been unaware of the flood of delayed manifestation claims that reached the courts in the early 1970s and predicted a new flood of delayed manifestation claims as a result of the majority's holding. *Id.* at 1-2, 5-6. Section 1-15(b), however, was enacted in 1971, see *supra* note 23, so it may have predated the crest of the wave of cases. Further, it is questionable how many claims based on § 1-15(b) remain in the system to be tried. An accurate estimate is not currently available. See Cohen, *Time Limit Struck Down in Long-Term Disease Cases*, Raleigh News & Observer, Nov. 7, 1985, at 1A, col. 1. Justice Meyer also noted that under the majority opinion, a worker's claim for asbestosis, if diagnosed before October 1, 1979, would be barred after 10 years from exposure under the workers' compensation system, but would not be barred by any statute of repose if the employee was not covered by the Workers' Compensation Act, a result Justice Meyer found "absurd." *Wilder*, slip op. at 4-5 (Meyer, J., dissenting).

63. The opinion does not mention whether plaintiff filed a workers' compensation claim. The applicable statute at the time would have required that disablement occur within two years after the last exposure to asbestos:

[A]n employer shall not be liable for any compensation for asbestosis or silicosis or lead poisoning unless disablement or death results within two years after the last exposure to such disease, or, in case of death, unless death follows continuous disablement from such disease, commencing within the period of two years limited herein, and for which compensation has been paid or awarded or timely claim made as hereinafter provided and results within seven years after such last exposure in the case of lead poisoning, or 350 weeks in the case of asbestosis or silicosis.

Act of April 12, 1955, ch. 525, § 6, 1955 N.C. Sess. Laws 468, 472.

The current statute extends to 10 years the period in which disablement must occur to recover for asbestos:

[An] employer shall not be liable for any compensation for asbestosis unless disablement or death results within 10 years after the last exposure to that disease, or, in the case of death, unless death follows continuous disablement from such disease, commencing within the period of 10 years limited herein, and for which compensation has been paid or awarded or timely claim made.

N.C. GEN. STAT. § 97-58(a) (Supp. 1983).

Presumably, if Wilder had filed a workers' compensation claim, it would have been barred by the 1979 version of N.C. GEN. STAT. § 97-58(a), which required that disablement occur within two years of last exposure.

64. *Wilder*, slip op. at 4 (Meyer, J., dissenting).

analysis of the cases preceding the statute's enactment. The court stated that prior to enactment of section 1-15(b), statutory periods for disease-related claims were deemed to start running from the time of diagnosis. However, in *Powers v. Planters National Bank & Trust Co.*,⁶⁵ plaintiff alleged defendant had conveyed property to him in 1934 that had been infected with tuberculosis germs without informing him about the tuberculosis. Plaintiff contracted tuberculosis and commenced his action in 1938.⁶⁶ The court affirmed a judgment of nonsuit for defendant, holding that the three-year statute of limitations began to run from the time of defendant's wrongful act rather than from the time of discovery of the tuberculosis germs.⁶⁷ In failing to discuss *Powers*, the *Wilder* court overlooked the fact that the discovery rule had not been applied uniformly to disease cases prior to enactment of section 1-15(b).

Although reports shortly after the *Wilder* decision anticipated that the decision would apply to the current statutes,⁶⁸ that result is far from certain. The court's only reference to either of those statutes was that "G.S. 1-15(b) is not intended to be a statute of limitations governing all negligence claims, such as the statute of limitations contained in the first clause of G.S. 1-52(16)."⁶⁹ Justice Meyer interpreted this reference to mean that section 1-52(16) would not bar claims based on occupational diseases diagnosed before October 1, 1979 (the effective date of section 1-15(b)'s repeal and section 1-52(16)'s enactment), but would bar claims based on diagnoses after that date.⁷⁰ The language of section 1-52(16) is similar to that of section 1-15(b), except that it does not contain an exception for wrongful death claims.⁷¹ Section 1-50(6), however, clearly states that no action for personal injury or death caused by a product shall be brought more than six years after the product was first purchased for use or consumption.⁷² There is nothing in the language of section 1-50(6) to suggest that its repose provision does not apply to delayed manifestation diseases.

In addition, although it is probably true that the general assembly's primary purpose in enacting section 1-15(b) and its replacement, 1-52(16), was to adopt the discovery rule,⁷³ section 1-50(6) appears to have been enacted for an entirely different purpose. The general assembly probably enacted section 1-50(6) to provide repose for manufacturers—that is, to ensure that manufacturers would not be held liable for injuries caused by their products later than six years after sale of the products.⁷⁴ At the time section 1-50(6) was enacted, asbestosis had

65. 219 N.C. 254, 13 S.E.2d 431 (1941).

66. *Id.* at 255, 13 S.E.2d at 431.

67. *Id.* at 256, 13 S.E.2d at 432.

68. *E.g.*, Editorial, *Justice for Product Victims*, Raleigh News & Observer, Nov. 8, 1985, at 18A, col. 1. For the text of the current statutes, see *supra* note 23.

69. *Wilder*, slip op. at 7.

70. *Id.* at 1, 6 (Meyer, J., dissenting).

71. See *supra* note 23 for the text of these statutes.

72. N.C. GEN. STAT. § 1-50(6) (1983) (text quoted *supra* at note 23).

73. See *supra* notes 29-31 and accompanying text.

74. The statute was passed as part of the Products Liability Act. See *supra* note 23. The wording of the statute makes it clear that its primary purpose was to provide repose. In enacting the statute, the general assembly may have been responding to the products liability "crisis" of the 1970s. See *infra* notes 201-05 and accompanying text.

received widespread public attention.⁷⁵ The general assembly surely was aware of the increasing number of products liability lawsuits based on exposure to asbestos. Thus, it would be difficult to apply the analysis in *Wilder* to section 1-50(6). The uncertainty surrounding the current statutes' applicability in delayed manifestation cases is a serious problem because at least one of the statutes has been used to bar asbestosis claims.⁷⁶

The majority's reliance on statutory interpretation suggests that it was seeking to avoid the troublesome question whether statutes such as section 1-15(b) are constitutional. Plaintiff in *Wilder* argued the unconstitutionality of such statutes in his brief;⁷⁷ the statutory argument adopted by the court had received far less attention from the parties than had the constitutionality argument.⁷⁸ The North Carolina Supreme Court eventually will have to decide whether statutes of repose are constitutional as applied to delayed manifestation diseases because, as discussed above, the analysis in *Wilder* probably does not apply to the North Carolina statutes of repose currently in effect.

In *Barwick v. Celotex Corp.*,⁷⁹ appellant challenged the constitutionality of section 1-15(b),⁸⁰ arguing that it violated the equal protection clause of the fourteenth amendment to the United States Constitution⁸¹ and the "open courts"⁸² and equal protection guarantees⁸³ of the North Carolina Constitution. The United States Court of Appeals for the Fourth Circuit predicted that the North Carolina Supreme Court would hold the statute constitutional.⁸⁴ The *Barwick* court's analysis will be relevant should the North Carolina Supreme Court have

75. See generally Brodeur, *supra* note 3 (four part article reporting the legal battles concerning asbestos-related disease during the last century with emphasis on the Manville Corporation).

76. See *infra* note 200.

77. The plaintiff's primary constitutional argument was that the statute violated the open courts clause of the North Carolina Constitution. Appellant's Brief at 32. Plaintiff also contended that the statute violated the exclusive emoluments provision of the North Carolina Constitution and the equal protection clause of the federal constitution. *Id.* at 36-41.

78. Compare Appellant's Brief at 28-29 (one and one-half pages arguing statute inapplicable to disease) and Appellees' Brief at 45-47 (three pages arguing statute applicable to disease) with Appellant's Brief at 30-41 (twelve pages arguing statute unconstitutional) and Appellees' Brief at 68-94 (twenty-seven pages arguing statute constitutional). The supreme court's analysis appears to have been drawn largely from an amicus curiae brief filed by the North Carolina White Lung Association. See Amicus Curiae Brief at 11-18.

79. 736 F.2d 946 (4th Cir. 1984). Barwick worked as a steam fitter and plumber from 1961 to 1980. He was informed he had asbestosis on January 10, 1979. *Id.* at 952. He filed actions against manufacturers of asbestos-containing products he claimed caused his asbestosis, *id.* at 949, alleging exposure to their products throughout his employment, without stating dates. *Id.* at 952. The United States District Court for the Eastern District of North Carolina granted defendants' motion for summary judgment, finding that plaintiff had raised no issue of material fact as to exposure to defendants' products during the ten-year period set forth in § 1-15(b). *Id.* at 953. The United States Court of Appeals for the Fourth Circuit affirmed. *Id.* Therefore, plaintiff's claim was held barred by § 1-15(b) even though he was not aware he had asbestosis until after the statutory period had expired.

80. *Barwick*, 736 F.2d at 955.

81. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

82. N.C. CONST. art. I, § 18 provides: "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial or delay."

83. *Id.* §§ 19, 32.

84. *Barwick*, 736 F.2d at 957-58.

to decide the constitutionality of sections 1-52(16) or 1-50(6) as applied to a delayed manifestation disease case. The flaws in the Fourth Circuit's reasoning illustrate that the North Carolina Supreme Court should hold the current statutes unconstitutional as applied to delayed manifestation disease claims.

Although the Fourth Circuit's opinion in *Barwick* does not make it clear, appellant's equal protection argument arose under two different provisions of the North Carolina Constitution: the equal protection clause, which provides that "[n]o person shall be denied the equal protection of the laws,"⁸⁵ and the "exclusive emoluments" clause, which provides that "[n]o person . . . is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public service."⁸⁶ The court's analysis of what it refers to as appellant's equal protection claim confuses these two clauses.⁸⁷ A review of the history of these two clauses, however, will help to clarify appellant's equal protection arguments.

The principle of equal protection of the law was not expressly incorporated into the North Carolina Constitution until July 1, 1971.⁸⁸ Prior to that time, the principle had been applied to the State only by way of the fourteenth amendment to the United States Constitution.⁸⁹ Equal protection means that a legislature cannot discriminate arbitrarily between individuals or groups.⁹⁰ Courts traditionally have used a "two-tiered" analysis of equal protection claims.⁹¹ When a law classifies persons based on their ability to exercise a fundamental right or upon a "suspect" basis, strict scrutiny is required and the government must show that the classification is a necessary means to achieve a compelling governmental interest.⁹² When the classification does not involve a fundamental right or a suspect class, the government need only show that the classification bears a rational relationship to a legitimate governmental interest.⁹³ It is not necessary that the legislation reach every class to which it might be applied.⁹⁴ As the North Carolina Supreme Court has stated, "[T]he only requirement necessary to comply with the equal protection provisions of both the federal and state constitutions is that the classification be reasonable and bear a rational

85. N.C. CONST. art. I, § 19.

86. *Id.* § 32.

87. For example, at one point the court refers to the equal protection clause of the North Carolina Constitution but cites the exclusive emoluments clause. See *Barwick*, 736 F.2d at 955.

88. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971). The equal protection principle was incorporated into the state constitution by way of N.C. CONST. art. I, § 19. *S.S. Kresge Co.*, 277 N.C. at 660, 178 S.E.2d at 385. For the language of this section, see *supra* text accompanying note 85.

89. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971).

90. *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 666-67, 174 S.E.2d 542, 546 (1970).

91. *Abbott v. Town of Highlands*, 52 N.C. App. 69, 75, 277 S.E.2d 820, 824 (quoting *Texfi Indus. v. City of Fayetteville*, 301 N.C. 1, 10-11, 269 S.E.2d 142, 149 (1980)), *disc. rev. denied*, 303 N.C. 710, 283 S.E.2d 136 (1981).

92. *Id.*

93. *Id.* at 75-76, 277 S.E.2d at 824-25.

94. *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 667, 174 S.E.2d 542, 547 (1970).

relationship to a permissible state objective."⁹⁵

The "exclusive emoluments" clause has been applied in a slightly different context. This provision prevents certain individuals or groups from receiving special privileges from the State. For example, the North Carolina Supreme Court has held that a statute which required dry cleaners to be licensed, but excluded those in several counties, violated the exclusive emoluments clause because it extended a privilege to the dry cleaners who did not have to pay the license fee.⁹⁶ Similarly, a statute making it unlawful to discharge poisonous substances into streams but exempting corporations chartered before a certain date was held unconstitutional.⁹⁷ The North Carolina Supreme Court stated:

[T]he date line running through the statute has no reasonable relation to the purpose of the law, only serving to mechanically split into two groups persons in like situation[s] with regard to the subject matter dealt with but in sharply contrasting positions as to the incidence and effect of the law; and . . . the attempted classification is not based upon a justifiable distinction.⁹⁸

When a privilege is granted to a group in consideration of public service, however, the constitutional prohibition against exclusive emoluments is not violated. Thus, a statute allowing veterans to become barbers without the examination and apprenticeship required of others was constitutional because the privilege was granted in consideration of the veterans' military service.⁹⁹

Although both the equal protection and the exclusive emoluments clauses of the state constitution concern legislatively created distinctions among individuals or groups, they do not have identical meanings. The equal protection clause protects against unfair discrimination, whereas the exclusive emoluments clause prevents the conferring of special privileges. At times, however, the same governmental act may violate both provisions.¹⁰⁰ Conversely, when there is a reasonable basis for a distinction among individuals or groups, the distinction may not violate either constitutional provision.¹⁰¹

In *Barwick* plaintiff's "equal protection" argument charged that the challenged statute promoted the interests of special groups over the interests of injured parties and that the statute served no legitimate public purpose.¹⁰² Clearly, this argument is both an equal protection and an exclusive emoluments argument. Plaintiff contended that he was a member of a special class of claim-

95. *Responsible Citizens in Opposition to the Flood Plain Ordinance v. City of Asheville*, 308 N.C. 255, 268-69, 302 S.E.2d 204, 213 (1983).

96. *State v. Harris*, 216 N.C. 746, 753, 6 S.E.2d 854, 859 (1940). The statute was found to violate N.C. CONST. of 1868, art. I, § 7—an earlier version of art. I, § 32.

97. *State v. Glidden Co.*, 228 N.C. 664, 46 S.E.2d 860 (1948).

98. *Id.* at 668, 46 S.E.2d at 862.

99. *Motley v. State Bd. of Barber Examiners*, 228 N.C. 337, 45 S.E.2d 550 (1947).

100. *E.g., In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973) (denial of certificate of need on grounds new hospital would endanger ability of other hospitals to keep their beds filled was unconstitutional).

101. *See, e.g., Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983) (architectural statute of repose constitutional); *State v. Knight*, 269 N.C. 100, 152 S.E.2d 179 (1967) (exclusion of certain categories of jurors constitutional).

102. *Barwick*, 736 F.2d at 958.

ants with latent diseases who were affected unfairly by the statute¹⁰³ and that the statute created a special class of defendants (manufacturers).¹⁰⁴ The former is the equal protection argument; the latter argument is essentially an exclusive emoluments argument—a contention that manufacturers unconstitutionally received a special privilege under the statute of repose. The Fourth Circuit rejected both arguments.¹⁰⁵

The court prefaced its examination of the legislative purpose behind section 1-15(b) with the affirmation that statutes enjoy a strong presumption of constitutionality.¹⁰⁶ Therefore, the burden of proof was on plaintiff. The court asserted that section 1-15(b) had been enacted for the purpose of adopting the discovery rule,¹⁰⁷ and disposed of plaintiff's argument that section 1-15(b) restricted the rights of plaintiffs with latent injuries by saying that the statute had improved rather than worsened the situation of most plaintiffs.¹⁰⁸ Defendants received the protection of the ten-year repose period to balance the advantage to plaintiffs resulting from the adoption of the discovery rule.¹⁰⁹ Thus, defendants received no special privileges in violation of the exclusive emoluments clause.

Responding further to plaintiff's claim that he was denied equal protection,¹¹⁰ the court stated that there was a legitimate public purpose behind section 1-15(b).¹¹¹ Repose itself was found to be a legitimate public purpose, especially when balanced against plaintiffs' "expanded rights" under the statute.¹¹² As long as the statute had a rational basis,¹¹³ the court reasoned, it did not violate the equal protection clause.¹¹⁴ The court failed to address specifically whether there was a rational basis for distinguishing between plaintiffs with delayed manifestation diseases and other plaintiffs.

Plaintiff's final constitutional argument was that the statute violated the open courts provision of the North Carolina Constitution. This argument was based on the allegation that appellant had been denied a remedy for his injury in violation of the open courts provision's requirement that every person be

103. *Id.* at 956.

104. *Id.*

105. The court did not distinguish between equal protection under the United States and North Carolina constitutions. Presumably such a distinction is unnecessary because the principle is applied in the same manner under both constitutions. See *supra* notes 88-95 and accompanying text.

106. *Barwick*, 736 F.2d at 955. The North Carolina Supreme Court recently made a similar pronouncement. *Tetterton v. Long Mfg. Co.*, 314 N.C. 44, 49, 332 S.E.2d 67, 70 (1985).

107. See *supra* notes 29-31 and accompanying text.

108. *Barwick*, 736 F.2d at 955-56.

109. *Id.* at 956.

110. *Id.* at 958.

111. In its analysis of the public purpose of § 1-15(b), the court relied heavily upon *Rafferty v. Wm. C. Vick Construction Co.*, 291 N.C. 180, 230 S.E.2d 405 (1976). See *supra* note 29 for a discussion of *Rafferty*.

112. *Barwick*, 736 F.2d at 958.

113. The court concluded that the rational basis test was appropriate because the statute did not "infringe a fundamental right [or] involve a suspect classification." *Id.*; see *supra* notes 88-95 and accompanying text.

114. *Barwick*, 736 F.2d at 958.

granted a remedy by due course of law for personal injuries.¹¹⁵ The Fourth Circuit also rejected this argument. The court observed that although a government must provide its citizens with remedies,¹¹⁶ it can establish time limits within which these remedies must be sought.¹¹⁷ Time limits established by the general assembly do not unconstitutionally deprive plaintiffs of remedies because the open courts clause provides for a remedy "by due course of law," not an absolute right to relief.¹¹⁸

Because the North Carolina Supreme Court had not ruled on the constitutionality of North Carolina General Statutes section 1-15(b),¹¹⁹ the Fourth Circuit supported its prediction of how the supreme court would have decided *Barwick* by citing a North Carolina Supreme Court case and cases from other jurisdictions holding similar statutes constitutional. In *Lamb v. Wedgewood South Corp.*,¹²⁰ the North Carolina Supreme Court held that North Carolina General Statutes section 1-50(5),¹²¹ a statute barring claims against architects and builders arising out of defects in property after six years, was constitutional. The supreme court recognized that this statute and other statutes of repose may bar rights of action before injury occurs,¹²² but held that the statute did not violate the equal protection clauses of the state or federal constitutions because it involved a reasonable classification.¹²³ The *Lamb* court also rejected plaintiff's argument that the statute violated the open courts provision of the North Caro-

115. *Id.* at 958. See *infra* note 118 for a discussion of North Carolina case law applying the open courts clause. The language of the open courts provision is quoted *supra* at note 82.

116. *Barwick*, 736 F.2d at 955.

117. *Id.* The court cited *Wilson v. Iseminger*, 185 U.S. 55 (1902). *Wilson* makes it clear that such time limits must be reasonable, and that the purpose of such limits is to prevent negligence and delay on the part of plaintiffs. *Wilson*, 185 U.S. at 62.

118. *Barwick*, 736 F.2d at 958. To support its conclusion the court cited *Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983). In *Lamb* the North Carolina Supreme Court stated that although the state constitution guarantees the right to a remedy, the remedy must be legally cognizable. The general assembly has the power to define the circumstances under which a remedy is cognizable. *Id.* at 444, 302 S.E.2d at 882. Thus, "unless the injury occurs within the six-year period [set forth in § 1-50(5)], there is no cognizable claim." *Id.* at 440, 302 S.E.2d at 880. See also *infra* notes 146-48 and accompanying text (discussion of reliance on *Lamb* in a more recent North Carolina Supreme Court case on statute of repose). For further discussion of *Lamb*, see *infra* notes 120-24 and accompanying text.

There is not much North Carolina case law applying the open courts clause to statutes of repose. A statute of repose was challenged on the basis of the open courts clause in *Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 284 S.E.2d 188 (1981), *modified*, 306 N.C. 364, 293 S.E.2d 415 (1982). The North Carolina Court of Appeals held that N.C. GEN. STAT. § 1-50(6) was unconstitutional on its face because it violated the open courts provision of the North Carolina Constitution. See *infra* notes 131-34 and accompanying text. The North Carolina Supreme Court held that plaintiff did not have standing to attack the constitutionality of the statute. See *infra* note 135 and accompanying text. For discussion of an unsuccessful challenge after *Lamb*, see *infra* note 124. See also *Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904) (court discussed open courts provision in libel case).

119. *Barwick*, 736 F.2d at 957. The North Carolina Supreme Court had the opportunity to address the constitutionality of the statute in *Wilder* but chose not to do so. See *supra* notes 77-78 and accompanying text.

120. 308 N.C. 419, 302 S.E.2d 868 (1983).

121. N.C. GEN. STAT. § 1-50(5) (1983).

122. *Lamb*, 308 N.C. at 427, 302 S.E.2d at 872.

123. *Id.* at 434-39, 302 S.E.2d at 876-80.

lina Constitution by barring his claim unless it arose within six years.¹²⁴

The North Carolina Supreme Court's language in *Lamb* may have influenced the court's decision not to discuss the constitutionality of section 1-15(b) in *Wilder*. The court might have believed that it would be difficult to reconcile its support of the statute of repose in *Lamb* with a finding that a similar statute was unconstitutional in a different context. *Lamb*, however, does not require a finding that the application of section 1-15(b) and other statutes of repose in delayed manifestation cases is constitutional. In *Lamb* there was no argument that the statute unreasonably discriminated among plaintiffs, whereas the statute as applied in *Barwick* unreasonably discriminated against plaintiffs with delayed manifestation diseases. Although this discriminatory result was avoided in *Wilder*, there is no guarantee that it will not recur in cases governed by sections 1-52(16) and 1-50(6).

In addition to *Lamb*, the Fourth Circuit in *Barwick* also relied on *Pitts v. Unarco Industries*,¹²⁵ in which the United States Court of Appeals for the Seventh Circuit held an Indiana statute of repose constitutional. *Pitts* involved a wrongful death action against asbestos manufacturers. The court held that plaintiff's claim was barred by Indiana's ten-year statute of repose and that the statute did not violate the due process or equal protection provisions of the federal or state constitutions.¹²⁶

Finally, the *Barwick* court cited *Hawkins v. D & J Press Co., Inc.*¹²⁷ In *Hawkins* the United States District Court for the Eastern District of Tennessee found the Tennessee ten-year statute of repose constitutional as applied to a plaintiff who was injured in an industrial accident. The statute at issue in *Hawkins*, however, contained the following provision: "The foregoing limitation of actions shall not apply to any action resulting from exposure to asbestos."¹²⁸ In an earlier case,¹²⁹ the statute without the asbestos exception had been applied to an asbestosis case and found constitutional. The legislature then excepted actions resulting from exposure to asbestos from the statute,¹³⁰ thus indicating

124. *Id.* at 440-45, 302 S.E.2d at 880-83. The United States Court of Appeals for the Fifth Circuit relied on *Lamb* in *Hines v. Tenneco Chems., Inc.*, 728 F.2d 729 (5th Cir. 1984), in holding that N.C. GEN. STAT. § 1-15(b) did not violate the open courts clause of the North Carolina Constitution.

The North Carolina Court of Appeals followed *Lamb* in *Square D. Co. v. C.J. Kern Contractors, Inc.*, 70 N.C. App. 30, 318 S.E.2d 527 (1984), holding § 1-50(5) constitutional. In his dissent, Judge Phillips acknowledged that the majority opinion was in accord with the supreme court's unanimous decision in *Lamb*, but stated his view that the statute is unconstitutional because the general assembly had no rational basis for immunizing architects and builders against liability after only six years. *Id.* at 39, 318 S.E.2d at 532 (Phillips, J., dissenting). He also stated that the statute "render[s] meaningless" the equal protection clauses of the federal and state constitutions and the open courts provision of the state constitution. *Id.* He described the statute as "an abolition of accountability to the public for a special class, in exchange for which no one else in society gets anything whatever." *Id.*

125. 712 F.2d 276 (7th Cir.), *cert. denied*, 464 U.S. 1003 (1983).

126. *Id.*; see also *Braswell v. Flintkote Mines, Ltd.*, 723 F.2d 527 (7th Cir. 1983) (statute of repose held constitutional in asbestosis case), *cert. denied*, 104 S. Ct. 2690 (1984).

127. 527 F. Supp. 386 (E.D. Tenn. 1981).

128. TENN. CODE ANN. § 29-28-103(b) (1980). See *infra* note 210 for language of the statute.

129. *Buckner v. GAF Corp.*, 495 F. Supp. 351 (E.D. Tenn. 1979).

130. See *Wayne v. Tennessee Valley Auth.*, 730 F.2d 392, 404 (5th Cir. 1984) (rational basis for

disapproval of the court's result.

The Fourth Circuit in *Barwick* failed to cite additional cases from North Carolina and other jurisdictions that are relevant to the issue of the constitutionality of North Carolina's statutes of repose. In a recent North Carolina case, *Bolick v. American Barnmag Corp.*,¹³¹ plaintiff was injured when he caught his hand in a machine that had been manufactured by defendant and sold more than six years earlier. The trial court granted summary judgment for defendant on the ground that plaintiff's claim was barred by North Carolina General Statutes section 1-50(6),¹³² the six-year statute of repose for products liability cases. The North Carolina Court of Appeals reversed, holding section 1-50(6) unconstitutional on its face.¹³³ The court reasoned that the statute extinguished the right to assert claims in cases in which the statute would bar them. Thus, the statute abolished the right to seek redress for injuries guaranteed by the open courts provision.¹³⁴ On appeal, the North Carolina Supreme Court held that the statute did not apply to plaintiff's action and therefore, that he had no standing to attack its constitutionality.¹³⁵ Although the supreme court avoided addressing the constitutionality of section 1-50(6) in *Bolick*, it did discuss the constitutionality of section 1-50(6) in a recent case, *Tetterton v. Long Manufacturing Co.*,¹³⁶ which was decided after *Barwick* and supports the *Barwick* court's conclusion.

In *Tetterton* plaintiff's husband was killed while he was operating a tobacco harvester the defendant manufacturer had sold more than six years earlier. On the basis of section 1-50(6), the trial court granted summary judgment for defendant.¹³⁷ On appeal, plaintiff challenged the statute's constitutionality,¹³⁸ arguing that it violated the equal protection clauses of the state¹³⁹ and federal¹⁴⁰ constitutions and the exclusive emoluments¹⁴¹ and open courts¹⁴² provisions of the North Carolina Constitution and that it was unconstitutionally vague.¹⁴³

asbestos exception); *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289, 1291 (6th Cir. 1983) (legislature made a mistake in not originally including an exception for asbestos exposure), *cert. denied*, 104 S. Ct. 3537 (1984).

The Tennessee statute still may be applied to bar claims arising out of other types of delayed manifestation diseases. See, e.g., *Mathis v. Eli Lilly & Co.*, 719 F.2d 134 (6th Cir. 1983) (DES case).

131. 54 N.C. App. 589, 284 S.E.2d 188 (1981), *modified*, 306 N.C. 364, 293 S.E.2d 415 (1982).

132. The text of § 1-50(6) is quoted *supra* at note 23.

133. *Bolick*, 54 N.C. App. at 590, 284 S.E.2d at 189; see also *Survey of Developments in North Carolina Law—Constitutional Law, 1981*, 60 N.C.L. REV. 1272, 1285-86 (1982) (describing *Bolick* holding).

134. *Bolick*, 54 N.C. App. at 592-93, 284 S.E.2d at 191-92.

135. *Bolick*, 306 N.C. at 365, 293 S.E.2d at 417.

136. 314 N.C. 44, 332 S.E.2d 67 (1985).

137. *Id.* at 46, 332 S.E.2d at 68.

138. *Id.* at 47-48, 332 S.E.2d at 69.

139. N.C. CONST. art. I, § 19. See *supra* text accompanying note 85 for the language of this clause.

140. U.S. CONST. amend. XIV, § 1. See *supra* note 81 for the language of this clause.

141. N.C. CONST. art. I, § 32. See *supra* text accompanying note 86 for the language of this clause.

142. N.C. CONST. art. I, § 18. See *supra* note 82 for the language of this clause.

143. The court rejected this argument, holding that the normal rules of statutory construction rectify any ambiguous statutory language of the act. See *Tetterton*, 314 N.C. at 54-56, 332 S.E.2d at 73-74.

The supreme court rejected these challenges. Although *Tetterton* did not involve delayed manifestation diseases, the court's reasoning in *Tetterton* is relevant to the constitutionality of section 1-50(6) as applied to delayed manifestation diseases.

The court in *Tetterton* rejected plaintiff's equal protection argument that the statute impermissibly distinguished between manufacturers and retailers by explaining that the statute was applicable to both manufacturers and retailers.¹⁴⁴ Similarly, the court rejected the argument that section 1-50(6) creates exclusive emoluments because the statute "does not on its face create a distinction between . . . groups."¹⁴⁵ The court also rejected plaintiff's open courts argument, relying on its language in *Lamb*: "We do not believe it correct to say that the statute bars a claim before the injury giving rise to the claim occurs. The statute's effect is that unless the injury occurs within the six-year period, there is no cognizable claim."¹⁴⁶

Significantly, the *Tetterton* court also repeated the observation of the *Lamb* court that "the legislature might pass a statute of repose that had a time period so short that it would effectively abolish all potential claims."¹⁴⁷ In cases involving durable goods, the court noted, over ninety-seven percent of accidents occur within six years of the date of purchase.¹⁴⁸ The court implied that because the vast majority of injuries caused by products such as tobacco harvesters will occur within the statutory six-year period, the statute does not violate the open courts clause. In contrast, when the vast majority of injuries caused by a particular type of product, such as asbestos, will occur after the statutory period has expired,¹⁴⁹ the statute should be found to violate the open courts clause when applied to bar claims based on injuries caused by that product.

The *Tetterton* court also discussed the general assembly's purpose in enacting section 1-50(6). The statute was enacted to shield manufacturers from liability for an indefinite length of time for injuries caused by durable goods.¹⁵⁰ As discussed below,¹⁵¹ the statute was enacted in response to the products liability "crisis"¹⁵² of the 1970s to limit the "long 'tail,' or period of potential liability" for manufacturers.¹⁵³ If the *Tetterton* court was correct about the legislative purpose behind section 1-50(6), then much of the analysis in *Wilder* will not

144. *Id.* at 49-52, 332 S.E.2d at 70-72. The effect of the statute in this case, however, was to bar plaintiff's claim against the manufacturer, who sold the machine in 1971, while preserving plaintiff's claim against the retailer, who sold the machine in 1975 (plaintiff's husband was killed in 1981). *Id.* at 46, 51, 332 S.E.2d at 68, 71.

145. *Id.* at 53, 332 S.E.2d at 72.

146. *Id.* (quoting *Lamb*, 308 N.C. at 440, 302 S.E.2d at 880).

147. *Id.* at 54, 332 S.E.2d at 73 (quoting *Lamb*, 308 N.C. at 444 n.7, 302 S.E.2d at 882 n.7).

148. *Id.*

149. Plaintiff in *Wilder* stated: "In the case of asbestos-related diseases . . . use of even a ten year statute of repose will preclude almost all potential asbestos claims from ever being asserted." Appellant's Brief at 31.

150. *Tetterton*, 34 N.C. at 55, 332 S.E.2d at 73-74.

151. See *infra* notes 202-05 and accompanying text.

152. See Dworkin, *Product Liability of the 1980s: "Repose is not the Destiny" of Manufacturers*, 61 N.C.L. REV. 33, 54 (1982).

153. *Tetterton*, 314 N.C. at 55, 332 S.E.2d at 73-74 (quoting McGovern, *supra* note 1, at 593).

apply to the current statute. Because section 1-50(6) was enacted to provide repose to manufactures and not to enact the discovery rule,¹⁵⁴ it may have been intended to apply to claims arising from diseases such as asbestosis. To alleviate the uncertainty surrounding the current statutes of repose, the North Carolina Supreme Court should address the constitutionality of the current statutes.

As the *Tetterton* court observed, courts in other jurisdictions have held statutes of repose unconstitutional per se (including, but not limited to cases considering their application in delayed manifestation cases). The supreme courts of Alabama,¹⁵⁵ Florida,¹⁵⁶ New Hampshire,¹⁵⁷ and Rhode Island¹⁵⁸ have found statutes of repose similar to section 1-15(b), the statute challenged in *Barwick*, unconstitutional. The Alabama Supreme Court found that a ten-year statute of repose violated the state constitution's open courts provision, which is virtually identical to North Carolina's.¹⁵⁹ The court reasoned that legislation which limits a common-law right is valid if the right is relinquished in exchange for equivalent benefits or if it eradicates a social evil.¹⁶⁰ The statute of repose did not meet either requirement.¹⁶¹ Even statutes that do not abrogate common-law rights must not be arbitrary or capricious.¹⁶² The challenged statute of repose was arbitrary and therefore unconstitutional.¹⁶³ Similarly, the Florida Supreme Court found that a twelve-year statute of repose violated the access to the courts provision of the state constitution.¹⁶⁴

A New Hampshire twelve-year statute of repose was found unconstitutional¹⁶⁵ because it barred some causes of action before they arose,¹⁶⁶ was not

154. See *supra* notes 29-31 and accompanying text.

155. *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996 (Ala. 1982) (plaintiffs injured when "manlift" elevator collapsed and fell).

156. *Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874 (Fla. 1980) (products liability action; type of product unclear); see also *Diamond v. E.R. Squibb & Sons*, 397 So. 2d 671 (Fla. 1981) (same result in a DES or delayed manifestation case).

157. *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 525, 464 A.2d 288, 295 (1983) (consolidated actions based on allegedly defective ratchet, crane, milling machine, wall heater, saw blade, motorcycle, portable commode, mobile home cooking system, and forklift; court refers to delayed manifestation diseases).

158. *Kennedy v. Cumberland Eng'g Co.*, 471 A.2d 195, 200 (R.I. 1984) (plaintiff allegedly injured while using machine; court discusses delayed manifestation diseases) (citing *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 464 A.2d 288 (1983)).

159. ALA. CONST. art. I, § 13 provides: "That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay." Compare this clause with N.C. CONST. art. I, § 18, quoted *supra* at note 82.

160. *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996, 1000 (Ala. 1982) (cited in *Tetterton*, 314 N.C. at 58, 332 S.E.2d at 75).

161. *Id.* at 1001-03.

162. *Id.* at 1003.

163. *Id.*

164. See *Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874, 874 (Fla. 1980) (cited in *Tetterton*, 314 N.C. at 58, 332 S.E.2d at 75). FLA. CONST. art. I, § 21 provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

165. N.H. CONST. pt. I, art. 14 provides:

Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and

substantially related to a legitimate legislative objective,¹⁶⁷ and denied products liability plaintiffs equal protection of the laws.¹⁶⁸ Finally, the Rhode Island Supreme Court held that the state's ten-year statute of repose denied access to the courts in violation of the state constitution:¹⁶⁹

To prohibit court access absolutely for a generally recognized claim to a class of plaintiffs merely because they were injured by a product more than ten years old not only is irrational, in our opinion, but also flies in the face of even minimal constitutional protection¹⁷⁰

Although the analysis in these cases was rejected in *Tetterton*, the cases provide examples of alternative treatments of the issues raised in *Barwick*. The *Tetterton* court rejected the constitutionality arguments presented in these cases in the context of a defective machine, but the supreme court should be more receptive to these arguments in a delayed manifestation disease case. The *Wilder* court's approach appears to be a novel treatment of statutes of repose in the context of delayed manifestation diseases. The court in *Wilder* clearly recognized the unfairness of barring causes of action for diseases before plaintiffs know they exist, but the court avoided holding statutes that have this effect unconstitutional. The result is uncertainty for plaintiffs whose claims are governed by more recent statutes. The North Carolina Supreme Court at its next opportunity should find North Carolina's statutes of repose unconstitutional when applied in delayed manifestation cases. The statutes distinguish between plaintiffs whose injuries manifest themselves within a certain number of years and those whose injuries do not manifest themselves until after the repose period has elapsed. Because of the long latency period of diseases such as asbestosis, an entire group of plaintiffs very often will be deprived of a remedy. In addition, the statutes of repose confer a benefit on manufacturers of products such as those containing asbestos that is not enjoyed by manufacturers of other types of products. To be permissible under the equal protection clause of the state¹⁷¹ and federal¹⁷² constitutions and the exclusive emoluments¹⁷³ provision of the North Carolina constitution, the distinctions between groups of plaintiffs and

justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

166. *Heath v. Sears, Roebuck & Co.*, 123 N.H. 512, 525, 464 A.2d 288, 295 (1983).

167. *Id.* at 526, 464 A.2d at 296. The court required a substantial relationship between the statute and a legitimate legislative objective. The court recognized that there was a crisis in products liability insurance, but found that the statute had become "entirely divorced from its underlying purpose." *Id.* Rather than furthering any legitimate public purpose, the court found the statute arbitrarily deprived certain injured plaintiffs of the right to sue manufacturers. *Id.*

168. *Id.*

169. R.I. CONST. art. I, § 5 provides:

Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely and without purchase, completely and without denial; conformably to the laws.

170. *Kennedy v. Cumberland Eng'g Co.*, 471 A.2d 195, 198 (R.I. 1984). The dissenting opinion in *Kennedy* (Murray, J., dissenting) was cited favorably in *Tetterton*, 314 N.C. at 58, 332 S.E.2d at 75.

171. N.C. CONST. art. I, § 19. See *supra* text accompanying note 85 for the language of this provision.

172. U.S. CONST. amend. XIV, § 1. See *supra* note 81 for the language of this provision.

among types of manufacturers must bear a rational relationship to a legitimate governmental objective.¹⁷⁴

As the *Wilder* court recognized, the primary purpose of section 1-15(b) appears to have been enactment of the discovery rule.¹⁷⁵ The ten-year limitation was no doubt included to facilitate passage of the statute. Prior to *Wilder* and *Barwick*, section 1-15(b) had been applied primarily in the "old product" context.¹⁷⁶ Such old product cases are distinguishable from delayed manifestation cases. Most injuries caused by defective products occur before the period of repose has expired;¹⁷⁷ thus, most deserving plaintiffs can recover. Delayed manifestation diseases, however, frequently do not become apparent until after the period has elapsed.¹⁷⁸ Asbestosis, for example, usually does not manifest itself until ten to twenty years after exposure to asbestos¹⁷⁹ and may take more than twenty years to manifest itself.¹⁸⁰ Mesothelioma, another disease caused by exposure to asbestos, usually does not manifest itself until twenty or more years after exposure to asbestos.¹⁸¹ Approximately eighty asbestos-related lawsuits have been filed in North Carolina since the first in 1979, and 30,000 to 40,000 such suits are filed nationwide each year.¹⁸² Thus, large numbers of plaintiffs potentially are denied relief because of statutes of repose.¹⁸³ Although those plaintiffs whose asbestosis was diagnosed prior to October 1, 1979, now may recover, many other plaintiffs still may be barred by sections 1-52(16) and 1-50(6).

Although a ten or six-year statute of repose does not preclude many other kinds of products liability claims, it does bar many delayed manifestation claims, such as those arising from exposure to asbestos. Therefore, unlike in old products cases in which most plaintiffs are given access to the courts, the *Barwick*

173. N.C. CONST. art. I, § 32. See *supra* text accompanying note 86 for the language of this provision.

174. See *supra* notes 90-95 & 101 and accompanying text.

175. See *supra* notes 29-31 and accompanying text.

176. See, e.g., *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982) (plaintiff injured while playing hockey when mouthguard shattered; claim not barred because last act of defendant occurred within previous 10 years).

177. *McGovern*, *supra* note 1, at 593.

178. *Dworkin*, *supra* note 152, at 43 n.65.

179. *Id.* at 35 n.13; see *supra* notes 34-35.

180. *W. PARKES*, *supra* note 3, at 268.

181. *Id.* at 276. Mesothelioma is a cancer of the pleural lining of the lungs or of the peritoneal lining of the abdomen. Unlike asbestosis, mesothelioma is 100% fatal. *Id.* at 292; *Arai & Weill*, *Clinical Problems in Asbestos-Related Diseases*, in *ASBESTOS-RELATED DISEASE* 22 (L. Preger ed. 1978).

182. *Durham Morning Herald*, Sept. 15, 1984, at B1, col. 1. Justice Meyer stated that 1,500 to 2,000 asbestosis suits have been filed in North Carolina state courts and the United States district courts for North Carolina, and that there are 25,000 asbestosis suits pending in the United States. *Wilder*, slip op. at 2 (Meyer, J., dissenting).

183. An asbestosis victim may be denied workers' compensation and tort relief as well. It has been suggested that both the workers' compensation and the tort systems developed to deal with industrial accidents and are not well-suited for compensating victims of occupational diseases such as asbestosis. Accidents are discrete events for which a clear cause and effect relationship often exists. Occupational diseases develop over time and their origins are often unclear. The tort and workers' compensation systems in many jurisdictions have not provided for these differences. Note, *Compensating Victims of Occupational Disease*, 93 HARV. L. REV. 916 (1980).

court's argument that the negative effect of the time limit on plaintiffs is balanced by the discovery rule¹⁸⁴ does not hold in many delayed manifestation cases. In addition, this argument would not apply to section 1-50(6), which was not enacted to adopt the discovery rule. Instead, section 1-50(6) appears to have been enacted to ensure repose for manufacturers.¹⁸⁵ Thus, there was no corresponding benefit to plaintiffs to counterbalance the advantage to defendants.

Other rationales behind statutes of repose are likewise not applicable to asbestos litigation.¹⁸⁶ Specifically, manufacturers contend that statutes of repose lead to more reasonable insurance rates and thus decrease the costs of products.¹⁸⁷ In the asbestos area, however, manufacturers often can no longer get insurance, regardless of the period of liability.¹⁸⁸ Another reason for statutes of repose is that they eliminate stale claims in which evidence has disappeared.¹⁸⁹ Evidence in asbestos litigation, however, improves rather than deteriorates with time.¹⁹⁰ Furthermore, "although holding an ordinary manufacturer responsible in perpetuity for a product with a finite useful [safe] life seems harsh, asbestos has no useful safe life; it is dangerous from the beginning and remains dangerous."¹⁹¹

The court in *Barwick* found that repose itself was a legitimate public purpose.¹⁹² Repose indeed may be a legitimate goal in some instances,¹⁹³ but not in the case of products that cause delayed manifestation injuries.¹⁹⁴ Manufacturers do not want to be held liable in perpetuity for injuries caused by their products. A product may be safe when manufactured, but the costs of ensuring safety beyond a certain length of time may make costs of production inordinately high. Products containing asbestos, however, are dangerous when they are manufactured. They do not become more dangerous with the passage of time. It is arbitrary, therefore, to distinguish between plaintiffs injured by exposure to asbestos and those injured by other types of products. Likewise, there is no clear rationale for allowing manufacturers of asbestos to avoid liability for injuries caused by their products when other manufacturers are liable simply because injuries caused by their products manifest themselves within a shorter time period.

The North Carolina statutes of repose also violate the state constitution's open courts provision.¹⁹⁵ The statutes deny access to the courts for plaintiffs with delayed manifestation diseases, thus denying these plaintiffs a remedy. The

184. See *supra* notes 107-09 and accompanying text.

185. See *supra* note 74 and accompanying text.

186. Special Project, *supra* note 13, at 656-58.

187. *Id.* at 653.

188. *Id.* at 657.

189. *Id.* at 653.

190. *Id.* at 657. As a general proposition in any case, if evidence has deteriorated over time, this problem is likely to be greater for the plaintiff, who has the burden of proof.

191. *Id.*

192. See *supra* note 112 and accompanying text.

193. See *infra* notes 204-05 and accompanying text.

194. See *supra* notes 178-81 and accompanying text.

195. See *supra* note 82.

Barwick court stated that remedies are subject to due course of law,¹⁹⁶ and the North Carolina Supreme Court has indicated that it will defer to the general assembly regarding limitations on remedies.¹⁹⁷ Nevertheless, the basis for withholding a remedy from those who are injured but do not know they are injured is far from clear. When a statute prohibits a majority of those injured by a particular type of product from bringing claims, the statute deprives an entire class of plaintiffs of access to the courts. The fact that the discovery rule adopted at the same time the statutes of repose were enacted makes it possible for a larger class of plaintiffs to recover does not justify creating distinctions between plaintiffs based upon the nature of their injuries rather than upon the diligence with which they pursue relief. The concept that a constitutional right may evaporate before it can be exercised lawfully is contrary to both the spirit and the letter of the North Carolina Constitution. Other courts have found such a result unconstitutional¹⁹⁸ and the North Carolina Supreme Court should follow their lead and adopt the reasoning of the North Carolina Court of Appeals in *Bolick v. American Barmag Corp.*,¹⁹⁹ rather than continuing to avoid the issue of the constitutionality of statutes of repose in the context of delayed manifestation diseases.

It is unclear whether the general assembly considered the disparate impact of statutes of repose on plaintiffs with delayed manifestation diseases when it enacted section 1-15(b) and the statutes replacing it.²⁰⁰ As the court in *Tetterton*²⁰¹ discussed, the statute challenged in *Wilder* and *Barwick*, as well as the current statutes, was passed in the 1970s as part of a nationwide trend. Elsewhere passage of similar statutes appears to have been largely in response to pressure from manufacturers and insurers.²⁰² Manufacturers contended that there was a products liability "crisis," as demonstrated by increasing insurance

196. *Barwick*, 736 F.2d at 958.

197. *Lamb*, 308 N.C. at 444, 302 S.E.2d at 882.

198. See *supra* notes 155-70 and accompanying text.

199. 54 N.C. App. 589, 284 S.E.2d 188 (1981), *modified*, 306 N.C. 364, 293 S.E.2d 415 (1982); see *supra* note 118; notes 131-35 and accompanying text.

200. Although N.C. GEN. STAT. § 1-15(b) has been repealed, it was replaced by two similar statutes. See *supra* note 23. One of these statutes, N.C. GEN. STAT. § 1-50(6), has been applied to bar several asbestosis claims. See *Silver v. Johns-Manville Corp.*, No. 81-16-CIV-2 (E.D.N.C. March 16, 1984); *Hyer v. Amatex Corp.*, No. A-C-81-289 (W.D.N.C. Oct. 17, 1983), *decision of appeal pending sub nom.* *Hyer v. Pittsburg Corning Corp.*, No. 83-2117 (4th Cir.). The United States Court of Appeals for the Fourth Circuit recently held this statute constitutional in *Brown v. General Elec. Co.*, 733 F.2d 1085 (4th Cir. 1984). In this products liability action based on an allegedly defective fryer, the court held that the plaintiff's action was barred by § 1-50(6) and that the statute does not violate various state and federal constitutional provisions. The North Carolina Supreme Court discussed the decision in *Brown* with approval in *Tetterton*, 314 N.C. at 57, 332 S.E.2d at 75.

The period of repose specified in § 1-50(6) is only six years, so it is likely that it will bar a greater number of claims than § 1-15(b). Shortly after the enactment of § 1-15(b), one commentator speculated as to whether the general assembly would be able to "resist the pressures of special interests to reduce the ten year limitation period." Lauerma, *The Accrual and Limitation of Causes of Actions for Nonapparent Bodily Harm and Physical Defects in Property in North Carolina*, 8 WAKE FOREST L. REV. 327, 385 (1972).

201. *Tetterton*, 314 N.C. at 55-56, 332 S.E.2d at 73-74.

202. See Dworkin, *supra* note 152, at 34; Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. REV. 663, 663-64 (1978); Options Paper on Product Liability and Accident Compensation Issues, 43 Fed. Reg. 40,438 (1978) (public commentary on

premiums.²⁰³ One of the manufacturers' primary concerns was the "long tail," or liability for damage done by old products.²⁰⁴ Statutes of repose limit manufacturers' liability for old products by setting a definite period of time after the date of sale within which all claims must be brought, regardless of when the product's harm occurred or was discovered.²⁰⁵

The goal of the North Carolina General Assembly in enacting statutes of repose mirrored that of other jurisdictions—a reduction in the potential liability of products manufacturers. The statutes' disparate effect in delayed manifestation cases most likely was not considered.²⁰⁶ If, in fact, the impact of section 1-15(b) and its replacements in delayed manifestation cases was not considered by the general assembly, it should be considered now in light of *Wilder*.

Wilder provides relief from the harsh effect of statutes of repose for plaintiffs whose occupational diseases were diagnosed before October 1, 1979. Many other disease victims still may be barred by the current statutes, however. The effect of these statutes in the context of delayed manifestation diseases may be unconstitutional, but the North Carolina Supreme Court does not appear willing to hold such statutes unconstitutional. Past precedents may make such a holding difficult,²⁰⁷ and the court's approach in *Wilder* indicates that it is not anxious to confront the issue of the statutes' constitutionality. The court should address the statutes' constitutionality to resolve the uncertainty surrounding the

proposed Model Uniform Product Liability Act); see also *Tetterton*, 314 N.C. at 55-56, 332 S.E.2d at 73-74 (detailing manufacturers' interest in establishing statutes of repose).

North Carolina's original statute was repealed in 1979 and replaced by similar statutes. See *supra* note 23.

203. See Phillips, *supra* note 202, at 663; Note, *When the Product Ticks: Products Liability and Statutes of Limitations*, 11 IND. L. REV. 693, 694-95 (1978).

It has been questioned whether such a crisis indeed existed. See, e.g., Johnson, *Products Liability "Reform": A Hazard to Consumers*, 56 N.C.L. REV. 677, 678 (1978).

204. See McGovern, *supra* note 1, at 593.

205. Before enactment of N.C. GEN. STAT. § 1-15(b), the statute of limitations began to run from the date of injury rather than from the date of discovery of an injury. Assuming that injury was defined as the date Barwick inhaled asbestos dust rather than when the asbestosis became apparent, his claim probably would also have been barred prior to enactment of § 1-15(b).

In enacting § 1-15(b), the general assembly adopted the discovery rule, which generally extends the time period within which products liability plaintiffs can bring actions. This development undoubtedly contributed to manufacturers' pressure for a statute of repose to limit their potential liability.

206. The court in *Barwick* believed otherwise. The court concluded that the general assembly was aware of "latent type injuries" in enacting § 1-15(b). *Barwick*, 736 F.2d at 956. There is a distinction, however, between latent injuries and delayed manifestation diseases. See *supra* notes 176-83 and accompanying text.

207. In holding an architectural statute of repose constitutional in *Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983), see *supra* notes 120-24, the North Carolina Supreme Court showed considerable deference to the general assembly. *Lamb*, 308 N.C. at 433-35, 302 S.E.2d at 876-83. Similarly, in *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982), the court indicated in dicta that it probably would find the recently enacted six year statute of repose for products liability actions, N.C. GEN. STAT. § 1-50(6) (1983), constitutional. See *supra* notes 131-35 and accompanying text. The court explained that the general assembly has the power to create conditions precedent to common-law causes of action and then stated: "We believe the legislature has created just such a condition precedent in G.S. 1-50(6)." *Bolick*, 306 N.C. at 371, 293 S.E.2d at 420. It seems likely, therefore, that should the North Carolina Supreme Court actually address the constitutionality of statutes of repose as applied to delayed manifestation diseases, it would be constrained by its own precedent to find such statutes constitutional.

current statutes. The general assembly, however, need not wait for the court to act. *Wilder* indicates that the public policy of the State is that plaintiffs with delayed manifestation diseases should not be barred from bringing claims before their diseases are diagnosed. The general assembly, therefore, should amend sections 1-50(6) and 1-52(16) to exempt delayed manifestation disease claims from the statutes' repose provisions.²⁰⁸

Assuming the North Carolina Supreme Court does not hold statutes of repose unconstitutional as applied to delayed manifestation diseases in the near future, legislative action is the only remaining means of ensuring relief to plaintiffs whose claims are governed by the current statutes of repose. The Alabama Legislature has provided that claims arising from exposure to asbestos accrue on the date the injured party reasonably should have discovered the injury.²⁰⁹ The statute is similar to North Carolina's in that it follows the discovery rule, but the Alabama statute differs from North Carolina's in that it does not establish an outer time limit within which the plaintiff must bring suit.

Legislatures in several other states with statutes similar to North Carolina's have created exceptions for claims arising from exposure to asbestos. For example, the Tennessee General Assembly amended its statute of repose to exempt

208. Because the application of such statutes to asbestosis and other delayed manifestation cases leads to harsh results, plaintiffs whose claims are governed by §§ 1-52(16) and 1-50(6) are likely to try challenges in addition to the constitutionality challenge as long as the court avoids the constitutionality issue and the general assembly does not amend the statutes. For example, such plaintiffs may argue that a statute of repose should be tolled in the case of fraud. Dworkin, *supra* note 152, at 51-52. Although delayed manifestation cases often are amenable to charges of fraudulent concealment by the defendant because of the time lag between discovery of the effect of the defendant's product and the public's knowledge of the effect, *id.*, clearly plaintiffs will not always be able to prove fraud. The plaintiff in *Wilder* raised the fraudulent concealment argument, Appellant's Brief at 8, but the court did not address this argument.

Delayed manifestation plaintiffs also might argue that a cause of action should not accrue until discovery of an injury, even if the injury is discovered later than the outer limit imposed by the statute. When the statute does not contain an outer limit, the discovery rule allows delayed manifestation plaintiffs to recover. See, e.g., *infra* note 209. A similar argument is that the defendant has a continuing duty to warn, so the statutory period should not begin to run until the plaintiff receives warning. This argument was unsuccessful in *Barwick*. See *Barwick*, 736 F.2d at 963. Plaintiff in *Wilder* raised the continuing duty to warn argument, Appellant's Brief at 18-20, but the court did not address it. Both of these arguments are likely to be rejected because they effectively do away with the outer limit imposed by the statutes. See *Barwick*, 736 F.2d at 963.

Finally, plaintiffs might attempt to persuade the courts to carve out an exception to the current statutes for delayed manifestation diseases as the *Wilder* court did for § 1-15(b).

209. ALA. CODE § 6-2-30 (Supp. 1985) provides:

(a) All civil actions must be commenced after the cause of action has accrued within the period prescribed in this article and not afterwards, unless otherwise specifically provided for in this Code.

(b) A civil action for any injury to the person or rights of another resulting from exposure to asbestos, including asbestos-containing products, shall be deemed to accrue on the first date the injured party, through reasonable diligence, should have reason to discover the injury giving rise to such civil action

By providing that the plaintiff's cause of action accrues upon discovery of his or her injury, the absolute time bar is avoided, assuming there is no outer cap on the period of discovery. Some courts follow this approach in determining when a cause of action accrues. See, e.g., *Locke v. Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900 (1981) (plaintiff's cause of action for mesothelioma accrues when tumor develops or when lung function is impaired, not when plaintiff was last exposed to asbestos). Other courts have rejected it. See, e.g., *Braswell v. Flintkote Mines, Ltd.*, 723 F.2d 527 (7th Cir. 1983) (cause of action accrues on last exposure to asbestos), *cert. denied*, 104 S. Ct. 2690 (1984).

asbestos cases from the ten-year repose period, even though the statute was held constitutional prior to the amendment.²¹⁰

The exception established in the Idaho statute of repose²¹¹ is more general, stating that the ten-year period of repose does not apply if injury was caused by prolonged exposure to a product if the defect in the product was not discoverable until ten years after delivery, or if the harm did not manifest itself until ten years after delivery. The Model Uniform Product Liability Act²¹² takes a similar approach.

Various policy reasons for treating delayed manifestation cases differently from other personal injury cases suggest that the North Carolina General Assembly should adopt one of these approaches toward legislative reform. Unlike other product-caused injuries, the diseases caused by exposure to asbestos generally take longer than six or ten years to develop.²¹³ Under existing North Carolina statutes, therefore, most causes of action for asbestosis and mesothelioma will be barred before the victim even knows he or she has a disease. While it is possible that this result "does not rise to constitutional dimensions,"²¹⁴ it does suggest that the rights of special interests, namely insurers and manufacturers, are protected from liability for delayed manifestation diseases to an inordinate degree.²¹⁵ Even in the absence of an absolute time limit to protect defendants, plaintiffs still would be faced with the burden of proof, including proof of causa-

210. See *supra* notes 127-30 and accompanying text. TENN. CODE ANN. § 29-28-103 (1980) reads:

(a) Any action against a manufacturer or seller of a product for injury to person or property caused by its defective or unreasonably dangerous condition must be brought within the period fixed by §§ 28-3-104, 28-3-105, 28-3-202 and 47-2-725, but notwithstanding any exceptions to these provisions it must be brought within six (6) years of the date of injury, in any event, the action must be brought within ten (10) years from the date on which the product was first purchased for use or consumption, or within one (1) year after the expiration of the anticipated life of the product, whichever is the shorter, except in the case of injury to minors whose action must be brought within a period of one (1) year after attaining the age of majority, whichever occurs sooner.

(b) *The foregoing limitation of actions shall not apply to any action resulting from exposure to asbestos.*

(emphasis added).

211. IDAHO CODE § [6-1403] 6-1303(2)(b)4 (Supp. 1985) provides:

The ten (10) year period of repose established in subsection (2)(a) hereof shall not apply if the harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until more than ten (10) years after the time of delivery, or if the harm, caused within 10 years after the time of delivery, did not manifest itself until after that time.

212. See MODEL UNIFORM PRODUCT LIABILITY ACT § 110(B)(2)(d), 44 Fed. Reg. 62,714, 62,732 (1979). Section 110(B)(1) establishes a presumption that after 10 years, the useful safe life of a product has expired. Section 110(B)(2)(d) provides:

The ten-(10-) year period of repose established in Subsection (B)(1) shall not apply if the harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by an ordinary reasonably prudent person until more than ten (10) years after the time of delivery, or if the harm, caused within 10 (ten) years after the time of delivery, did not manifest itself until after that time.

213. See *supra* notes 178-81 and accompanying text.

214. Phillips, *supra* note 202, at 673.

215. See Dworkin, *supra* note 152, at 43.

tion and product identification;²¹⁶ the lapse of time between exposure to asbestos and manifestation of the disease increases the difficulty of the plaintiff's task. Thus, an exception in the statute for delayed manifestation diseases would not tip the balance in favor of plaintiffs, but rather would create a more equitable relationship between plaintiffs and defendants.

The North Carolina Supreme Court in *Wilder* took an important first step toward recognizing the inequity in barring plaintiffs from pursuing remedies before they know they are injured. In holding that section 1-15(b) does not apply to diseases, the court avoided the unfair result reached by the Fourth Circuit in *Barwick*. By resting its decision on statutory rather than constitutional analysis, however, the supreme court left open the question whether sections 1-50(6) and 1-52(16), the statutes of repose currently in effect, apply to delayed manifestation diseases. Perhaps the court would be unwilling in light of its precedents²¹⁷ to hold these statutes unconstitutional, but it is clear that the *Wilder* court sought to avoid the application of this type of statute to delayed manifestation diseases. The result the court reached was equitable, but the problem the statutes create was not resolved. The next step should be the general assembly's—it should follow the example of other states and create an exception to the repose provisions of sections 1-50(6) and 1-52(16) for delayed manifestation diseases such as asbestosis. Under this approach, plaintiffs with delayed manifestation diseases would be required to bring claims within a certain period of time after discovery of their disease, but without the current ten or six year limit. Such a provision would remove the uncertainty surrounding the statutes after *Wilder* and would equitably balance the interests of defendants and plaintiffs.

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216. See Johnson, *supra* note 203, at 691; McGovern, *supra* note 1, at 590; Phillips, *supra* note 202, at 674.

217. See *supra* note 207 and accompanying text.

